

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 116/2019**

% **8th February, 2019**

ASHOK ATREE

..... Appellant

Through: Dr. Farrukh Khan and Mr.
M.Sadiq Khan, Advocates.

versus

MUNICIPAL CORPORATION OF DELHI & ANR.

..... Respondents

Through: Mr. Bijay Arora & Mr. Kapil
Dutta, Adv. for SDMC.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No. 5920/2019 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No. 116/2019 and C.M. No. 5919/2019 (stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the trial court dated 22.11.2018 by which

the trial court has dismissed the suit for injunction filed by the appellant/plaintiff seeking rights in a 15 ft. strip of land comprised in Khasra no. 403, Village Masjid Moth, New Delhi. The trial court has held that the appellant/plaintiff is not the owner of the suit land and in fact the appellant/plaintiff is guilty of encroachment of suit land which is a public land, and this encroachment which was done by the appellant/plaintiff with his brother was removed on 20.08.2004, but once again the appellant/plaintiff has thereafter encroached upon the public land. The earlier encroachment made was removed by respondent/defendant on 20.08.2004 after the suit filed by the brother of the appellant/plaintiff, Sh. Krishan Gopal Atree, and who lives in the same premises as that of the appellant/plaintiff, was dismissed in default with respect to the same suit premises/land resulting in vacation of the injunction obtained by Sh. Krishan Gopal Atree, and also the application for restoration of the suit was also dismissed.

3. The facts of the case are that the appellant/plaintiff pleaded that the appellant/plaintiff is the owner of the subject land, being a 15 ft. wide strip of land falling in Khasra No. 403 of Village Masjid Moth, New Delhi, and adjoining to the east side of the

residence of the appellant/plaintiff. The appellant/plaintiff with his other brothers is the owner of and residing in House No. 282, Village Masjid Moth, New Delhi, and this 15 ft. strip of land adjoins two public parks located on the two sides of the Property No. 282, being the North side and the South side of the Property No. 282 of the appellant/plaintiff and his brothers. The appellant/plaintiff pleaded that his grandfather Pandit Leela Ram was owner of some land in Khasra Nos. 404 and 405 and he had formed a colonising company M/s LMG Colonisers Pvt. Ltd. which had created a residential colony. This residential colony which was developed, is R-Block, South Extension Part-II, New Delhi, the colony included the land falling in Khasra No. 405. Pandit Hukum Chand was the son of Pandit Leela Ram and the appellant/plaintiff is the son of Pandit Hukum Chand. It was pleaded that in 1977, there was a family settlement between Pandit Hukum Chand and his sons whereby the Property No. 282, of Village Masjid Moth was also partitioned in four parts. It was pleaded that the Property No. 282 abuts on a 15 ft. wide road (disputed land) towards the East of the property and that this strip of land is used by the appellant/plaintiff and the other family members through the gates

installed in the Property No. 282. It is pleaded that this disputed 15 ft. strip of land never formed a part of the lay-out plan of the colony and this land always remained in the possession of the appellant/plaintiff and his brothers, and before them, their forefathers. It was pleaded that in 1994, there was an *inter se* dispute between the brothers of the appellant/plaintiff resulting in a suit being filed by Sh. Krishan Gopal Atree against Sh. Harish Chand Atree and the Municipal Corporation of Delhi (MCD) bearing ***Suit No. 2675/1994***. It was pleaded that in the above mentioned suit, a Local Commissioner was appointed who submitted her Report dated 20.12.1994 in favour of the brother, Sh. Krishan Gopal Atree, who was found to be in possession of the 15 ft. wide disputed land. The suit filed by the brother of the appellant/plaintiff was however ultimately dismissed in default and it was stated that the MCD Officials made an attempt on 20.08.2004 to demolish the boundary wall and the grills installed in front of the suit property owned by the appellant/plaintiff and his brother. The appellant/plaintiff pleads that he was told later on that his brother had obtained a stay in the suit, and which did not survive any more as the restoration application of the brother, Sh. Krishan Gopal Atree, under

Order IX Rule 9 CPC was dismissed by the court of Sh. Rakesh Kapoor, ADJ, Delhi on 11.04.2005 and therefore, MCD was free to demolish the wall in front of the property of the appellant/plaintiff and his family members. It is also pleaded that there was a Demarcation Report dated 08.07.1974 which showed the possession of the suit property in favour of the father of the appellant/plaintiff and as recorded by the revenue officials. It was further pleaded that the suit land did not form a part of the Lay-Out Plan of the colony approved by the Standing Committee of the MCD on 28.03.1960. Pleading that there is an immediate threat of demolition to the wall in the side, abutting the 15 ft. wide strip, and further, the MCD threatening to take illegal possession of this disputed 15 ft. wide area, the subject suit was filed.

4. The respondents/defendants-MCD contested the suit and filed its written statement. The MCD has pleaded that the suit was barred by *res judicata*/constructive *res judicata* as earlier a suit was filed by the brother of the appellant/plaintiff, Sh. Krishan Gopal Atree, which was dismissed in default and the restoration application filed by Sh. Krishan Gopal Atree was also dismissed in default. It was pleaded

that thereafter the subject suit has been filed by the appellant/plaintiff in connivance with his brother, but the suit was filed only after the officials of the MCD had already taken action on 20.08.2004 taking into its possession the suit land in question, however, the appellant/plaintiff and his brother have again tried to encroach upon the suit land. The application for restoration of the suit filed by Sh. Krishan Gopal Atree was said to have been dismissed vide Order dated 11.04.2005 by the court of Sh. Rakesh Kapoor, ADJ, Delhi. It was also pleaded that under the garb of the subject suit, and which is only for permanent injunction, the appellant/plaintiff is claiming declaration of his ownership rights in the suit property, and the same cannot be allowed. It was pleaded that the appellant/plaintiff has not filed any ownership documents of the suit property. It was also pleaded that an ***FIR No. 547/1994*** dated 25.11.1994 under Sections 447/427 of the Indian Penal Code, 1860 had been registered at the Police Station: Defence Colony against the brother of the appellant/plaintiff, Sh. Krishan Gopal Atree, for demolition of the wall of the park and for making unauthorized installation of gates in the park of the MCD. It was pleaded that the appellant/plaintiff and his

brothers are encroachers of public land and the suit be therefore dismissed. It was further pleaded that neither the appellant/plaintiff nor his brother or any other person has any right to open a gate into the municipal park being a 15 ft. wide strip, and this 15 ft. wide strip joins the two public parks which fall on the two sides of the Property No. 282 owned by the appellant/plaintiff and his brothers.

5. The trial court framed the following issues:-

- “(i) Whether the Plaintiff is entitled to the relief of injunction? OPP.**
- (ii) Whether the suit property forms part of Municipal Park, as alleged in the written statement? OPD.**
- (iii) Whether the present suit is barred by res judicata? OPD**
- (iv) Whether the present suit is barred under section 447/478 of the Delhi Municipal Corporation Act, 1957? OPD**
- (v) Is the suit barred by limitation? OPD**
- (vii) Relief(s).”**

6. The evidence which was led by the parties is as recorded in paras 4 and 5 of the impugned judgment, and these paras read as under:-

“4. The plaintiff has examined himself as PW1 and besides the affidavit in evidence as Ex. PW1/A, has tendered into evidence the following documents i.e. site plan of the property is Ex. PW1/1; the layout plan is Ex. PW1/2; the development plant is Ex. PW1/3; the true Khasra Girdwari with its true translation of the said khasras issued on

06.03.1974 is Ex. PW1/4; Khasra Girdawari issued on 16.03.1975 is Ex. PW1/5; photographs of the property are Ex.PW1/6, Ex. PW1/7, Ex. PW1/8, Ex. PW1/9, Ex. PW1/10 & Ex.PW1/11. The negatives of the said photographs is Ex. PW1/12 (colly); the certified copies of the report of Ld. Local Commissioner are Ex. P-3 & Ex P-4, copy of the order dated 30.11.1994 of the Hon'ble High Court is Ex. PW1/3; the demarcation report is Ex. PW1/14; survey report of the suit property is Ex. PW1/15; house tax receipt is Ex P1; copy of the election I-card is Mark-A; Original Icard lost receipt at PS: Hauz Khas vide NCR No: 3094/2012 is Ex.PW1/18; Adhar Card is Ex. PW1/19.

(ii) The plaintiff has also examined Sh. Devi Ram from the office of Tehsil Mehrauli, New Delhi as PW2.

(iii) The plaintiff has also examined Sh. Komal Sharma from the BSES Office, A-1/27, Safdarjung Enclave, New Delhi as PW3, who tendered the attested copies of the electricity bill dated 03.10.12, the application for transfer of connection dated 26.06.2013 along with supporting affidavit and annexures, which were collectively exhibited as Ex. PW3/1 (colly).

(iv) The plaintiff has also examined Sh. Jagbir Singh, LDC, Record Keeper, A&C Department, South Zone, Sector 9, R.K. Puram, New Delhi as PW4.

(v) The plaintiff has also examined Sh. Ashok Kumar, Kanoongo, Record Room, SDM Office, Mehrauli as PW5.

All the witnesses were cross examined and were discharged.

5. The defendant has examined Sh. Jaivir Singh, Assistant Director, Horticulture Central Zone as DW1 who tendered his affidavit into evidence as Ex. DW1/A along with the documents i.e. copy of the layout plan attested by Deputy Town Planner, Land as Mark-A; copy of the handing over / taking of possession documents of the park in question dated 20.11.1973, attested by Assistant Director, Horticulture as Ex. DW1/1; attested copy of list of parks in New Delhi South Extension part-II, transferred from south zone to central zone (duly attested by Assistant Director Horticulture) as Ex.DW1/2; Photocopy of inventory register of the park in question handed over from south zone to central zone on 18.04.1995 as MarkB, certified copy of order dated 09.02.2004 passed by Learned District Court in suit no: 2675/1994 as Ex. DW1/6; copy of order dated 11.04.2005 passed by Hon'ble Court in suit no: 2675/1994 as Ex. DW1/4.

Defendant has also examined Sh. Mahesh Chand, planning surveyor from the office of Chief Town Planner, SDMC, Head Quarter, Civic Center, Minto Road, New Delhi as DW2 and has tendered the attested copy of the lay out plan of South Extension Area near Village Masjid Moth, New Delhi as Ex. DW2/1 (OSR).

The witnesses were cross examined and discharged, thereafter, the evidence of the defendants was closed vide separate statement of the defendant.”

7. The first aspect which in the opinion of this Court clearly goes against the appellant/plaintiff is that appellant/plaintiff can claim rights to the suit land which falls in Khasra No. 403 only, and only if the appellant/plaintiff was able to file documents to show ownership of Khasra No. 403 of the appellant's/plaintiff's family or that of his forefathers, but admittedly no document whatsoever has been filed to show that Khasra No. 403 ever vested or was in the ownership of the appellant's/plaintiff's family or their forefathers. As per the documents filed by the appellant/plaintiff, being the Khasra Girdawaris, the suit land is shown to be in ownership of the *abadi* of village Masjid Moth i.e. land is owned by the entire population of the Village Masjid Moth, and thus resulting in the suit land being village common lands, known as *shamlat deh* land in Delhi. After passing of the Delhi Land Reforms Act, 1954, the ownership of the village common lands stood vested in the Central Government as per Section

7 of the Delhi Land Reforms Act. In any case, the ownership of the Khasra No. 403 by the entire *abadi*/population of Village Masjid Moth cannot mean that the appellant/plaintiff or his family members or their forefathers were ever the owners of land in Khasra No. 403.

8. I may note that even the case of the appellant/plaintiff is that his grandfather Pandit Leela Ram was the owner of some lands in Khasra Nos. 404 and 405 i.e. not in Khasra No. 403. Accordingly, once the appellant/plaintiff or his family members or their forefathers were not the owners of the suit land, hence, they have no entitlement to claim possession of the suit land which is vacant/open land.

9. In my opinion, trial court has also rightly held that the simpliciter suit for permanent injunction filed by the appellant/plaintiff was not maintainable in view of the fact that the appellant's/plaintiff's ownership of the suit land was seriously disputed. Once there are serious disputes as to the ownership of the suit land, and this issue of ownership has to be decided by the trial court, then a simpliciter suit alleging settled possession when the possession of the appellant/plaintiff is not established on record, did not lie and hence, the trial court was justified in holding the simpliciter suit for

permanent injunction as not maintainable in view of the ratio of the judgment of the Hon'ble Supreme Court in the case of *Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and Others, (2008) 4 SCC 594*. The Hon'ble Supreme Court in the case of *Anathula Sudhakar (supra)* speaking through Hon'ble R.V. Raveendran, J. has exhaustively laid down the principles as to when a suit for injunction simpliciter is maintainable and the relevant paras of said judgment laying down the ratio are paras 13.1 to 13.3, 14, 15 and 16, and these paras read as under:-

“13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2 Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3 Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his

title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

15. In a suit for permanent injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.

16. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was

at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.”

(Underlining Added)

10. Once the appellant/plaintiff and his family members and their forefathers were not the owners of the suit land, and the suit land is an open strip of land, the observations made by the Hon'ble Supreme Court in para 16 of the judgment in the case of *Anathula Sudhakar (supra)* squarely applies that possession follows title. The appellant/plaintiff having failed to prove title of his family and their forefathers in the suit land, hence, the appellant/plaintiff also cannot claim to be in settled possession of the same.

11. The doctrine of settled possession for protecting of the same has been exhaustively dealt with by the Hon'ble Supreme Court in the case of *Rame Gowda (Dead) By Lrs. v. M. Varadappa Naidu (Dead) By Lrs. and Another, (2004) 1 SCC 769*. It has been categorically held by the Hon'ble Supreme Court in this judgment that to be in settled possession, the occupant must have come into possession with the acquiescence of the owner. In the present case, there is no evidence that the MCD/Union of India ever gave its

consent or acquiescence for the appellant/plaintiff or his family members and forefathers to be in possession of the suit land. The relevant paras of the judgment in *Rame Gowda's case (supra)* are paras 8 to 10, and these paras read as under:-

“8. It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

9. It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to *Munshi Ram v. Delhi Admn.*, *Puran Singh v. State of Punjab* and *Ram Rattan v. State of U.P.* The authorities need not be multiplied. In *Munshi Ram* case it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is, entitled to defend his possession even against the rightful

owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In *Puran Singh* case the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase "settled possession" does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of "settled possession":

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of *animus possidendi*. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession.

10. In the cases of *Munshi Ram* and *Puran Singh* the Court has approved the statement of law made in *Horam v. R.* wherein a distinction was drawn between the trespasser in the process of acquiring possession

and the trespasser who had already accomplished or completed his possession wherein the true owner may be treated to have acquiesced in; while the former can be obstructed and turned out by the true owner even by using reasonable force, the latter may be dispossessed by the true owner only by having recourse to the due process of law for re-acquiring possession over his property.”

(Emphasis Supplied)

12. It is noted that it has been deposed to by the witness, Sh. Jaivir Singh, who deposed as DW-1 for MCD, that the earlier suit filed by the brother of the appellant/plaintiff was dismissed in default and the restoration application was dismissed on 11.04.2005. The Orders dismissing the suit on 09.02.2004 and dismissing the restoration application on 11.04.2005 have been filed and proved on record as Ex. DW1/6 and Ex. DW1/4. The present suit was filed by the appellant/plaintiff barely around two weeks after the dismissal of the restoration application in the earlier suit on 11.04.2005. The present suit has been filed on 23.04.2005.

13. In my opinion, the trial court has rightly rejected the Local Commissioner's report filed in the earlier suit between the brothers of the appellant/plaintiff and the MCD, inasmuch as the report of possession will not show settled possession for the settled possession to be a legal right, and to avoid repetition, reference is

invited to the ratio of the judgment of the Hon'ble Supreme Court in the case of *Rame Gowda's case (supra)*, and more so with the fact that the appellant/plaintiff and his family members never had any title to the land comprised in Khasra No. 403, with also the fact that the suit land being open land, possession follows title in view of the ratio of the judgment in the case of *Anathula Sudhakar (supra)*.

14. In my opinion, the trial court has very thoroughly and exhaustively in detail dealt with all the aspects in paras 6 to 14 of the impugned judgment, and these paras are reproduced as under:-

“6. **My issue wise findings are as under:-**

I have taken up all the issues for discussion together the issues being interrelated and inter linked having consequential bearing on each other. I note at the outset that suit of the plaintiff is for preventive relief and not any declaratory decree. Plaintiff claims that the plaintiff along with his three brothers is in possession of house bearing no: 282, Village Masjid Moth as absolute owners, and that the four brothers pursuant to a family settlement have partitioned the property bearing no. 282, Village Masjid Moth and are in possession of their respective portions. I may also note, at the outset, that it is not the entire property bearing on. 282, Village Masjid Moth that is the subject matter of the dispute. It is a portion of the property bearing no. 282, Village Masjid Moth falling on the eastern end towards the 15 feet wide road that is in dispute as the defendant alleges that a portion of the MCD Park has been encroached upon by the plaintiff by raising a wall and an iron gate. It is the case of the plaintiff that the premises in question abuts on to the fifteen feet wide road on the front side of the property falling on the eastern side, which the plaintiff describes as front set back which is the point of access and entry into the property where a gate along the boundary wall is installed and has been in existence since the very beginning and is the only reasonable access to the property, and that the defendants are liable to be restrained from raising a boundary wall blocking the access of the property

in question to the 15 feet wide road on the eastern side of the property and from interfering and causing any obstruction in the peaceful possession & enjoyment of the “front set back” in the eastern side of the property in question. The plaintiff alleges that the front set back of the property in question belongs to the plaintiff and his brothers and has been in their settled possession through their forefathers and it was never a part of Municipal Park. The defendant on the other hand contends that the plaintiff/occupants of property in question have encroached upon portion of MCD park by raising a wall, that the land in question has always been a part of a Municipal/public park in the ownership control & Management of the defendant and is not a part of the property in question and the plaintiff has no right to carve out a passage or to open a gate into the said Municipal public park and that MCD has taken action in respect of the encroachments made by the plaintiff and his brothers on MCD land on 20.08.2004 and taken into possession the land in question however the plaintiff and his brothers have again re-entered / encroached upon the land in question.

7. Injunctions are issued towards preventive relief. A perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing, whether expressly or by implication in his favour and where the defendant invades or threatens to invade the plaintiffs right to or enjoyment of the property a court may grant a perpetual injunction, where there exists no standards of ascertaining the actual damage or where compensation in money would not afford adequate relief and the injunction is necessary to prevent a multiplicity of judicial proceedings. The obligation may arise from contract, or may be in the nature of a trust, or an obligation the breach of which amounts to a tort or civil wrong or any other legal obligation. An injunction will be granted if it is the only means of enforcing a right and where damages may be an adequate remedy court may not grant an injunction or restrain an actionable wrong. It is not in every case where the plaintiff's right to property is invaded that a perpetual injunction will be granted. Injunction may be granted where the value or utility of the property itself or the very existence of the property, is threatened. There must, however, be a right to, or enjoyment of property. The plaintiff must show his title to property in order to claim injunction. Where he has title, and possession, he is entitled to injunction that his possession shall not be disturbed. Where there is an invasion of the plaintiff's right to or enjoyment of property an injunction may be granted only in the four cases mentioned in clauses (I)-(iv) of sub-section (3) of Section 38 of the Specific Relief Act. The preventive relief in the manner of prohibitory, mandatory injunction is discretionary relief and the discretion is guided by the provisions of the Specific Relief and particularly as contained under Section 38 of the Specific Relief Act which is reproduced here under:-

Perpetual injunction when granted:- (1) subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) when any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:-

a) where the defendant is trustee of the property for the plaintiff;

b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

c) where the invasion is such that compensation in money would not afford adequate relief;

d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

In a suit seeking the grant of prohibitory injunction against the defendant, it is for the plaintiff to establish the existence of the right the infringement of which is to be prevented by way of a prohibitory injunction, or the obligation existing in favour of the plaintiff breach of which is to be plugged by way of a perpetual injunction and the right to the property sought to be invaded by the defendant, enjoyment of which is to be secured by restraining the defendant from doing any such act as would interfere with the right of the plaintiff in the property.

8. It is the case of the plaintiff that property bearing no. 282, Village Masjid Moth is ancestral property owned by the plaintiff and his three brothers acquired by their forefathers. This property fell in the abadi deh, Lal Dora of village Masjid Moth. There was a family settlement amongst the brothers and the property bearing no. 282, Village Masjid Moth was partitioned in four parts and the portion falling in the rear end came into the plaintiff's possession. The plaintiff contends that the rear end portion, the eastern end of this property opens into / abuts onto a 15 ft. wide road that is the only point of reasonable access to the property in question. The said property as per the case of the plaintiff falls in the abadi

deh of Village Masjid Moth, Khasra No. 403 and Khasra Nos. 404 and 405 are the adjacent lands. The plaintiff alleges that the grandfather of the plaintiff Sh. Leela Ram owned lands in Khasra No. 404 and 405 also and he had set up a company under the name and style of LMG Developers and Colonisers to carve out a colony on the land falling in Khasra NO. 405. The colony so developed by Pt. Leela Ram now constitutes part of south extension part-II, new Delhi. Out of the land owned in Khasra No. 405, 2 bighas 19 biswas was transferred in favour of the said company and 5 biswas land was retained by him. The plaintiff has relied upon Khasra Girdawari of Village Kotla Mubarakpur to show that Khasra No. 403, is the abadi deh occupied by abadi of Masjid Moth, Khasra No. 404, is owned by Leela Ram and is also in his possession and Khasra No. 405 is in ownership and in possession of LNG coloniser out of which 0-5 biswas was in possession of the grandfather of the plaintiff and the rest of 02 bigha 19 biswas was in possession of LMG Colonisers. The revenue record confirms the plaintiff's assertion. The Khasra Girdawari in respect of Village Mubarakpur Kotla, Tehsil Mehrauli reflects that Khasra No. 403 is occupied by the abadi of Village Masjid Monto, Khasra No. 404 is owned by Sh. Leela Ram and is in his possession and that Khasra no. 405 is owned by LNG Colonisers, out of which 05 biswas is in the possession of Hukam Chand and the balance land of Khasra no. 405 is in the possession of LNG Colonisers Ltd. Revenue entries however are not proof of title. So far as Khasra No. 405, is concerned 05 biswa is recorded in the revenue entries to be in the possession of Sh. Hukam Chand though the ownership of the entire Khasra is recorded in favour of LNG Colonisers Ltd. As per the revenue entries therefore the predecessor in title of the plaintiffs is not recorded as the owner of any portion of Khasra No. 405.

9. The mode of acquisition of land in the said Khasra Nos. is neither averred nor attempted to be proved. So far as the property in question is concerned it falls in the Khasra No. 403, Khasra Nos. 404 & 405 are adjacent to the property in question. No title documents, record of any kind in respect of the property in question is relied upon by the plaintiff. The area of the property in question is nowhere alleged or affirmed by the plaintiff. The plaintiff alongwith his brothers are in possession of their respective portions, the respective portions are shown in different colors in the site plan of the property in question, however the dimensions, the total area of property bearing no. 282, village Masjid Moth, New Delhi is not stated anywhere. The assertion as regards actual area in occupation, what as per the plaintiff is the area of the property in question is of particular relevance, for the entire property is not in dispute but only a portion thereof which the plaintiff refers to as the "front set back on the eastern end" which as per the plaintiff abuts on to a 15 feet wide road and separates the property in question from R Block on the other side of the road of South Extension-II. The plaintiff alleges that on the North and South of

the property fall two separate chunks of MCD Parks, separated by the property in question. The defendants on the other hand contend that the MCD Park is one continuum from the north end to the souther end alongside the 15 feet wide road and not two separate portions on the north and south of the property, divided by the property in question, and that the plaintiff and the occupants of property in question have encroached upon the land of the park and constructed a gate. The plaintiff relies upon a layout plan of South Extension Part-II, a demarcation report and the report of the court commissioner appointed in a suit for preventive relief instituted by one of brothers of the plaintiff for the same relief in respect of the property in question against the present defendant alongwith others.

10. The layout plan filed by the plaintiff has been retraced from the original plan. The plaintiff has not examined the draftsman who has retraced the layout plan. Further the property in question is shown in a broken line that extends upto the 15 feet wide road on the eastern side. It is not explained as to why the property in question is shown in a broken line and as to whether in the original lay out plan also the property in question is shown in a broken line. The plaintiff has failed to prove the layout plan relied upon by him. Moreover, the layout plan is incomplete and the property in question is shown in a broken line thereby indicating that it is not a true trace of the original. Who traced the layout plan, whether it was traced in the presence of the plaintiff are essential assertions to render the tracing admissible in evidence. Mere exhibition thereof is not sufficient for the Court to draw any inference in respect of the status of the property in question. The defendant has also filed the layout plan tendered as Mark A and has examined the planning surveyor from the office of Chief Town Planner SDMC to prove the layout plan of South Extension area near village Masjid Moth which is tendered as Ex. DW2/1. The layout plan Ex. DW2/1 depicts that beyond the property in question lies a park of the MCD Park which connects the MCD Park on the two sides, the North and the South side of the property in question. There is no break visible in the MCD Park on the North and South side of the property in question. The MCD Park on the North side continues by a narrow stretch along the eastern side of the suit property extending on to the Southern side of the suit property. The 15 feet wide road does not touch the suit property but lies beyond the stretch of the MCD Park.

11. The plaintiff has further relied upon a demarcation report dated 08.07.1974. The document reveals that the demarcation is carried out on the application of the father of the plaintiff for demarcation of Khasra No. 546/404, 547/404 and 405 of Village Kotla Mubarakpur. The property in question as per the own case of the plaintiff falls in Khasra No. 403. The demarcation report is not in respect of Khsara No. 403 in which the property in question is situate. Possession of the father of the plaintiffs is recorded on

4¾ biswa of the vacant land in Khasra No. 405 and 1½ biswa of land in Khasra no.403. It is also recorded in the demarcation report relied upon by the plaintiff that the application for demarcation pertains to 4 ¾ biswa land falling in Khasra No. 405 and 1½ biswa of land that falls in Khasra No. 403 is not part of the application for demarcation and the report and the site plan are prepared after demarcation of Khasras 404 and 405. There is no reference of a 15 feet wide road abutting the property in question in the demarcation report. The survey report that the plaintiff relies upon is also inconclusive as it records that the West side of the house no. 282 falls in Khasra No. 403 in the Lal Dora (old badi) of village masjid moth but the length of the house on west to east is much more than east to west and therefore it cannot be ascertained without khasra girdawari and demarcation as to whether the east part of the house is in lal dora or falls in some other Khasra No. or how much of the part of the house number 282 falls in Khasra no. 403 of Lal Dora. This report is dated 15.03.2005.

12. The plaintiff further relies upon report of the Local Commissioner appointed by the Hon'ble High Court of Delhi in Suit No. 2675/94. The plaintiff has not proved the report by examining the author thereof. It is not alleged that report was prepared in the presence of the plaintiff. As per the own contention of the plaintiff, plaintiff was not a party to the said proceedings. The proceedings in which the report is filed did not culminate into the final adjudication on merits as per the own case of the plaintiff as the said suit was dismissed in default, there is therefore no findings on merit recorded on the strength of the said report. The plaintiff on the strength of the incomplete trace of the lay out plan, Khasra Girdawaris, demarcation report dated 08.07.1974, survey report dated 15.03.2005 has failed to demonstrate the existence of any right in the plaintiff to occupy and possess the disputed portion on the eastern end of the property in question. None of the documents indicate the dimensions of the property in question and do not support the claim of the plaintiff that the property bearing no. 282, Masjid Moth, abuts on to the 15 feet wide road on its eastern end. The four brothers have partitioned the property in question so that the plaintiff's portion falls on the rear end to the east. To the West the property in question opens onto and lies along the street lane. It is not that the property in question has no point of ingress and egress except on its eastern end via gates A and B. The contention of the plaintiff that plaintiff has easementary rights over the disputed portion is also misplaced. It is one thing to exercise a right over the property of another towards a more beneficial enjoyment of one's own property and it is another matter all together to claim absolute ownership thereupon. It is not the case of the plaintiff that though the land in dispute is part of MCD Park, however, for the beneficial enjoyment of its own property bearing no.282, Masjid Moth, the plaintiff is entitled to use the part of the MCD Park for ingress and egress as the said portion has been in use as such

for over 30 years or time immemorial. The case of the plaintiff is that the portion in dispute constitutes part of property bearing no. 282, Masjid Moth. In the exercise of easementary rights, the plaintiff, on the subservient heritage cannot claim the right to raise a wall and erect iron gate and prevent the MCD to construct boundary wall. Easement and encroachment are not interchangeable concepts. The plaintiff denies any right / title of the MCD and claims absolute title in himself alongwith his brothers, through his forefathers. The documentary evidence that the plaintiff relies upon does not substantiate this claim of the plaintiff. The plaintiff has to stand on its own legs. In case the plaintiff could demonstrate the semblance of any right / title / interest over the disputed portion, then only the onus would have shifted on the defendant to demonstrate that the disputed portion is part of MCD Park. The defendant has proved the layout plan of South Extension-II, Village Masjid which reflects that the property bearing no. 282, Masjid Moth, does not abut on to the 15 feet wide road. For the failure of the plaintiff to lead any cogent, credible documentary evidence, and on the strength of the layout plan filed by the defendant, issue no. 2 is liable to be answered against the plaintiff and in favour of the defendant.

13. So far as the report of the Court Commissioner filed in the proceedings instituted by the brother of the plaintiff is concerned no preventive relief is capable of being determined in favour of the plaintiff on the strength of the report of Court Commissioner appointed in earlier proceedings, however, the said proceedings in the course of which the Court Commissioner was appointed and report was filed in themselves have significant bearing on the determination of the entitlement of the plaintiff to the preventive relief being claimed by the plaintiff.

The said suit registered as CS No. 282/03 was instituted by the brother of the plaintiff and co-occupant of the premises in question. It is a suit for permanent injunction against defendants including MCD for restraining the defendants from raising obstructions to the plaintiff from entering upon the passage as shown in the site plan from gate at point B and from raising any boundary wall in front of the said gate. The relief sought is reproduced hereunder:-

“pass a decree of permanent injunction in favour of the plaintiff and against the defendants restraining the defendants, their servants and agents from raising obstruction to the plaintiff to enter upon the passage shown in red in the site plan filed with the suit plaint from the gate market at point B at property bearing municipal no. 282, Village Masjid Moth, New Delhi, the defendants be further restrained from raising any boundary wall in front of the said gate.”

The said suit against MCD was instituted by the brother of the plaintiff, a co-occupant of the premises in question alleging that the defendant no. 3 / MCD has made a false complaint on 29.11.1994 against him alleging that the plaintiff has demolished the wall of the park located on the southern side as the plaintiff intended to raise construction and that the plants in front of the property had been burnt alleging that the wooden gate at point B was always in existence and was replaced recently with iron gate, a false complaint was instituted by twisting the facts that there was a door in the wall and now iron door was being affixed and FIR No. 547/94 was registered. It was alleged that no portion of the park falls in front of the property in question on the eastern side, and that in October /November the plaintiff had widened the gate from 6 feet to 16 feet and instead of wooden gate had installed new iron gate. FIR was registered that the plaintiff has affixed a big gate in the said park and demolished the wall of the park and was blocking the entry of the municipal staff to the park and destroying trees and plants in the park. The MCD started claiming that the space between point A and B is part of municipal park. Plaintiff contended that the said space was the front set back of the property in question and not part of the municipal park. MCD threatened to raise a boundary wall right across point B. The suit was instituted on such cause of action registered as CS (OS) 2675/94 on 29.11.1994 for restraining the MCD from raising the boundary wall across the point B. MCD had contested the said suit on the ground that the plaintiff the brother of the present plaintiff, had raised unauthorized construction of a wall on municipal land and is trying to lay claim on public land and perpetuate his illegal user of the same. Status quo in respect of the suit property was directed to be maintained. The said suit was dismissed in default on 09.02.2004. An application for restoration of the suit was filed which was dismissed on 11.04.2005. The present suit is instituted on 23.05.2005.

14. The present suit is again for the same preventive relief against the MCD on the same grounds filed by a co-occupant of the same property and the portion of the property disputed is also the same. The plaintiff derives the cause of action for the present suit w.e.f. 19.04.2005 i.e. immediately after the dismissal of the suit for the same preventive relief filed by the plaintiff's brother, a co-occupant of the property in question when allegedly MCD officials came to the property in question and started taking measurements. The plaintiff himself has disclosed the details of the Civil Suit filed by the plaintiff's brother for the same preventive relief as is sought in the present suit in respect of the same portion of the property in question. The plaintiff himself discloses that the said suit was dismissed in default and he came to know that the application for restoration of the said suit has also been dismissed. MCD alleges that action in accordance with law was taken and the wall raised by plaintiff / occupants of

property bearing no. 282, Masjid Moth, was demolished and that the MCD Park was again encroached upon by the plaintiff and his brother, however the record in respect of the action taken is not brought on the record. That a similar contention was raised to rebut the application for restoration of the suit instituted by the plaintiff's brother which was dismissed in default, and on such contentions the application for restoration was successfully resisted is not proof of the action taken in accordance with procedure established by law. Be that as it may, what I find particularly relevant is the own statement of the plaintiff in paragraph 10 of the plaint to the effect that prior to 1994 MCD had never claimed any right in the suit property. As per the own case of the plaintiff MCD is asserting its ownership since 1994. The plaintiff is aware that the previous suit against the MCD for permanent injunction restraining MCD from interfering in the peaceful possession / raising a wall in the portion of the property in question was dismissed in default and the restoration application was also dismissed. Though the defendant has failed to produce the record in respect of any action against the encroachment, however, the own documents relied upon by the plaintiff, the suit filed by the plaintiff's brother for the same relief reveals that FIR against the plaintiff's brother in respect of the encroachment on MCD land has been got registered by MCD, under such facts and circumstances it was incumbent upon the plaintiff to have sought a declaration in respect of the status / right in the disputed property and a suit simplicitor for preventive reliefs without an adjudication on the substantive rights of the disputing parties is not amenable, for the occupants of property bearing no. 282, Masjid Moth cannot be permitted to perpetuate their possession by filing suits one after the other for preventive reliefs without seeking declaration of their right, title and entitlement and determination of their substantive rights as owners entitled to possession of the disputed property, the portion of the property that MCD is disputing since 1994 to be a portion of MCD Park. On these grounds, I find that the suit of the plaintiff simplicitor for permanent injunction is liable to be dismissed. Issue no. 1 is answered accordingly."

(Underlining Added)

15. It is also required to be noted that respondent/defendant had filed a lay-out plan of the colony of South Extension as Ex. DW2/1 and this plan Ex. DW2/1 showed that the strip of land was a connecting portion of land between two public parks which fell to the

North and South side of the Property No. 282 of the appellant/plaintiff and his family members. The site plan Ex. DW2/1 clearly records that there is a continuous strip which joins the two public parks on the North and South side of the Property No. 282, and therefore, the strip of land was a continuous piece of land adjoining two public parks.

16. In view of the aforesaid discussion, the suit and the present appeal filed by the appellant/plaintiff is an abuse of the process of law. The suit is in continuation of the illegal litigation initiated by the appellant/plaintiff and his family members inasmuch as the subject suit was filed on 23.04.2005, after the earlier suit filed by the brother of the appellant/plaintiff, Sh. Krishan Gopal Atree, was dismissed and restoration application was also dismissed, thereby the *ex parte* stay was vacated. The MCD thereafter on 20.08.2004 demolished the illegal boundary wall made by the appellant/plaintiff and his family members, but once again the appellant/plaintiff has encroached upon public land. The subject litigation has now been pending since 1994, and today we are in the year 2019 i.e. the MCD has been burdened with this illegal litigation of the appellant/plaintiff and his family members since around 25 years and for these 25 years the appellant/plaintiff and his family members have illegally used the land under false interim orders obtained

by them. This appeal, therefore, being a gross abuse of the process of law is dismissed with costs of Rs. 5,00,000/- payable to respondent/defendant inasmuch as it is found that the appellant/plaintiff and his family members including the brother have resorted to false litigation to encroach and take possession of valuable public land. In fact, such circumstances of seeking encroachment on public lands have now become a serious malaise in the society and it is necessary that the courts come down with heavy hands on such unscrupulous persons who try to encroach upon public property. This Court in fact was inclined to, but which has not been done, to award costs of Rs. 25,00,000/-, being Rs. 1,00,000/- for each year, and which would have compensated the respondent/defendant in some way as damages for the illegal occupation of the suit land.

17. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed. All pending applications are also disposed of.

FEBRUARY 08, 2019/ Ne

VALMIKI J. MEHTA, J